Addendum A

Addendum A
IBM's Undisputed Facts: SCO's Copyright Infringement Claim

	IBMP & Statement	S.CO. R.C.Done	
;	In 1969, Bell Laboratories, then the research	Undisputed.	Undisputed.
	division of AT&T Corp. ("AT&T"), developed a	-	
	computer operating system that came to be known as the LIMIX operating system (See E.y. 2 off 1		
	23; Ex. 5 ¶ 1, 8; Ex. 64 ¶ 1.)		
7	AT&T developed many different versions of its	Undisputed.	Undisputed.
	UNIX operating systems, including UNIX	•	•
	System V, the version of UNIX developed by		
	AT&T during the early 1980s. (See Ex. 5 ¶ 9;		
	Ex. 29/ at 32.)	Annual Control of the	CONTRACTOR OF THE PROPERTY OF
<u>к;</u>	Over the years, through various business units and	Undisputed.	Undisputed.
	subsidiaries, including AT&T Technologies, Inc.		
	and UNIX System Laboratories, Inc. ("USL"),		
	AT&T licensed its UNIX operating systems, both		
	in source code and object code form, to many		
_	thousands of persons and entities for their use.		
	(See Ex. 3 ¶ 23-24; Ex. 5 ¶ 9; Ex. 64 ¶ 2.)		
	AT&T also licensed many companies to distribute		
	their own UNIX operating systems, such as		
	Hewlett-Packard Co.'s "HP-UX" operating		
	system. (See Ex. 3 ¶ 24-27; Ex. 64 ¶ 3.)		
4,	Among AT&T's licensees were IBM and	Undisputed.	Undisputed.
	Sequent, which IBM acquired in 1999. (See Ex. 3		
	11 62-69; Ex. 5 11 12, 15.) IBM and Sequent		
	entered into their UNIX licensing agreements		
	with AT&T (collectively, the "Agreements") in		
~	early 1986. (See Ex. 5 ¶ 12, 15; Ex. 3 ¶ 62-69.)		
	The Agreements are governed by New York law.		
	(See, e.g., Ex. 492 § 7.13.)		

S. Which which which with term term term term term term term UNIT Ex. I Ex. I Ex. I BM with with with which which when when modifications of the software so	Both companies entered into software agreements, which set forth the terms under which they could use AT&T's UNIX software, as well as sublicensing agreements, which set forth the terms under which software programs "based on" UNIX System V could be distributed. (Ex. 492;	to the extent the statement suggests that letter defined the contractual relationship AT&T and Sequent. (Contracts Mem.	Deemed admitted: Nothing in SCO's statement
	ich set forth the terms under which they could AT&T's UNIX software, as well as licensing agreements, which set forth the ns under which software programs "based on" IX System V could be distributed. (Ex. 492;	the Side Letter defined the contractual relationship between AT&T and Sequent. (Contracts Mem.	
	AT&T's UNIX software, as well as licensing agreements, which set forth the ns under which software programs "based on" IX System V could be distributed. (Ex. 492,	between AT&T and Sequent. (Contracts Mem.	specifically controverts IBM's facts with
	licensing agreements, which set forth the ns under which software programs "based on" IX System V could be distributed. (Ex. 492;		admissible evidence meeting the requirements of
	ns under which software programs "based on" IX System V could be distributed. (Ex. 492;	(II 88-89.)	Rule 56.
	IX System V could be distributed. (Ex. 492,		
	119; Ex. 120; Ex. 121; Ex. 282 ¶¶ 6-8;		
	Ex. 182 [15.) IBM also entered into a side letter		
	with AT&T (the "Side Letter") that further		
	defined their relationship. (Ex. 122.)		
IBM Software	While the Agreements placed restrictions on what	Disputed to the extent the statement suggests that	Deemed admitted: Nothing in SCO's statement
Sequence of the sequence of th	IBM and Sequent could do with AT&T's UNIX	IBM and Sequent did not enter into written	specifically controverts IBM's facts with
Sequand Sequal and Seq	software, they did not restrict what IBM and	agreements requiring them to hold in confidence	admissible evidence meeting the requirements of
and 8 do as whet modified V, so softv	Sequent could do with their original works. IBM	all parts of their modifications and derivative	Rule 56, and the material referred to by SCO
do as whet modified to software.	and Sequent were free under the Agreements to	works based on the licensed UNIX System V	does not support SCO's statement.
whet modification whet whet modification whet whet modification with the modification whether whether whether modification whether whe	do as they wished with their original works,	software product. (Contracts Mem. ¶ 13-29, 82-	
modi V, sc softv Ex. 1	whether or not they were included in a	86.) Disputed to the extent that the statement	
V, so Softy	modification or derivative work of UNIX System	suggests that, upon entering into their written	
softv Ex. 1	V, so long as they protected AT&T's UNIX	agreements, the parties did not intend to exclude	
<u> </u>	software. (See Ex. 492 § 2.01; Ex. 122 ¶ A.2;	any previous oral discussion from the agreements	
	Ex. 182 ¶ 18, 20.)	the parties had reached. (Contracts Mem. ¶ 18,	
		91-92.) "The IBM Agreements and the Sequent	
		Agreements (collectively 'the Agreements') set	
		forth the terms under which UNIX System V	
		could be used and disclosed by them and under	
		which they could distribute software programs	
		'based on' UNIX System V." (IBM Statement of	
		Undisputed Facts in Support of IBM's Motion for	
		Summary Judgment on SCO's Contract Claims	
		(50.)	

	1BW & Statement		
۲.		ntended to impose a	Deemed admitted: Nothing in SCO's statement
	protect any trade secrets embodied in UNIX	confidentiality obligation beyond what it could	specifically controverts with admissible
	System V source code provided by AT&T or	enforce under trade secret law, and that	evidence meeting the requirements of Rule 56
	USL. (See Ex. 281 ¶ 31.) AT&T "did not intend	confidentiality obligation was a core aspect of	the undisputed fact that the Agreements were
	to impose a confidentiality obligation beyond	AT&T's UNIX license agreements. (Contracts	primarily designed to protect any trade secrets
	what [it] could enforce under trade secret law".	Mem. [1] 63-96.) In fact, AT&T sought the	embodied in UNIX System V source code
	(10.)	broadest protections possible under the	provided by AT&T or USL. Further, the
		Agreements. (#81.)	material referred to by SCO in ¶ 81 of its
			contracts brief does not support SCO's
			statement. SCO Ex. 7 \$\(\) 6 actually supports
			IBM's statement. SCO Ex. 375 ¶ 11 and SCO
			Ex. 333 ¶ 14 do not contain any statement
			relating to trade secrets, and IBM Ex. 261 at 182
			actually supports IBM's statement. The cited
			evidence referred to is not based on personal
	And the second s		knowledge and is hearsay.
 ∞i	IBM's and Sequent's rights under the Agreements	Disputed to the extent the statement states a legal	Deemed admitted: Nothing in SCO's statement
*********	could not be terminated except for material	conclusion and to the extent the statement purports	specifically controverts IBM's facts with
	breach. (See Fx. 492 § 6.03; Ex. 120 § 3.03;	to summarize the terms of either IBM's or	admissible evidence meeting the requirements of
	Ex. 122 ¶ A.5; Ex. 119 § 6.03; Ex. 260 at 247-48.)	Sequent's written agreements, in that the Sequent	Rule 56. Further, SCO does not contest the
		Agreement sets forth no requirement of	supposed "legal conclusion" purportedly
		materiality and the IBM Side Letter provides that	contained in the referenced paragraph. (SCO Br.
		IBM's rights could be terminated for what AT&T	at 25-30.)
		considered to be material breach. (¶ 13-14.)	
		Disputed to the extent the statement suggests that	
		the Side Letter defined the contractual relationship	
		between AT&T and Sequent. (Confracts Mem.	
		88-89.)	

	TBM R Since To Company		
9.	ider a breach material unless	Depending on the meaning of the term "its core	Deemed admitted: Nothing in SCO's statement
	presented a significant violation of its core	intellectual property rights," disputed in that	(or the referenced paragraphs in its contracts
	intellectual property rights. (See Ex. 260 at 247.)	substantial evidence shows (and easily permits the	memorandum) specifically controverts with
	Michael DeFazio, the head of AT&T's UNIX	inference) that among the core protections in	admissible evidence meeting the requirements of
	licensing efforts, has testified that AT&T's	AT&T's standard UNIX license agreement was	Rule 56 the undisputed fact that AT&T did not
	purpose was "to ensure that immaterial or trivial	the requirement that the licensee hold in	consider a breach material unless it presented a
	violations of confidentiality would not be judged	confidence "all parts" of its modifications or	significant violation of its core intellectual
	to be a breach of the [Agreements]". (1d.; Ex. 182	derivative works based on the licensed UNIX	property rights. Further, none of the witnesses
	1)	software product. (Contracts Mem. ¶¶ 63-163.)	that SCO relies on dispute the fact that AT&T's
		Disputed in that Mr. DeFazio had not drafted and	purpose was to ensure that immaterial or trivial
_		did not have the authority to modify or negotiate	violations of confidentiality would not be judged
		away the terms of AT&T's standard UNIX license	to be a breach of the agreements.
		agreements, and was only one of many individuals	•
		responsible for interpreting and enforcing the	
		agreements. (Contracts Mem. ¶ 63-163.)	
<u>.</u> 0	AT&T's goal in implementing its licensing	Depending on the meaning of the terms	Deemed admitted: Nothing in SCO's statement,
	agreements was not to have "gotcha's" with its	"gotcha's," "minor violations," and "the core of its	the referenced paragraphs, or any statements of
	licensees on minor violations, but to protect the	intellectual property," disputed in that substantial	the witnesses that SCO relies on specifically
	core of its intellectual property. AT&T focused,	evidence shows (and easily permits the inference)	controverts, with admissible evidence meeting
	therefore, on substance and materiality from a	that among the core protections in AT&T's	the requirements of Rule 56, the undisputed fact
	business perspective. (See Ex. 260 at 248.) As	standard UNIX license agreement was the	that AT&T's goal in implementing its licensing
	Michael DeFazio stated, "[AT&T's] goal was not	requirement that the licensee hold in confidence	agreements was not to have "gotcha's" with its
	here to implement a lot of agreements and then	all parts of its modifications or derivative works	licensees on minor violations, but to protect the
	have what I'll call 'gotcha's' with all our	based on the licensed UNIX software product.	core of its intellectual property, and that AT&T
	licensees on insignificant or minor or trivial	(Contracts Mem. ¶ 63-163.) Disputed to the	focused on substance and materiality from a
	violations. We [AT&T] were concerned about	extent the statement suggests that Mr. DeFazio	business perspective.
	protecting the core of our intellectual property,	had drafted or had the authority to modify or	•
	and that meant substance and materiality is what	negotiate away the terms of AT&T's standard	
	we were focused on from a business side." (Id.)	UNIX license agreements, as he was only one of	
		several individuals responsible for interpreting and	
		enforcing the agreements. (Contracts Mem. ¶¶ 63-	***************************************
7		163.)	

breach, the Disputed to the extent the statement states a legal conclusion and purports to summarize the termination provisions of the IBM and Sequent quired AT&T to quired AT&T to atto resolve any atton. (Ex. 492 d with the Disputed to the extent the statement suggests that lo as they wished and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works IBM's was known based on the licensed UNIX System V software product. (Contracts Mem. ¶ff 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ff 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent pelieved they were obligated to hold in confidence all parts of their UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)				
Agreements could only be terminated after 100 conclusion and purports to summarize the days' notice (for 170, or 60 days inchee (for 170, or 60 days) or 60 days inchee (for 170, or 6	=	Even in the event of a material	int the statement states a legal	Deemed admitted: Nothing in SCO's statement
days' notice (for AIX) or 60 days' notice (for Dyinx) and an opportunity to cure any braceh. Furthermore, the Side Letter required AT&T to exercise its "good faith best efforts to resolve any alleged breach" prior to termination. (Ex. 492 § 6.03; Ex. 121 § 3.03; Ex. 122 ¶ A.5.) Bursuant to the Agreements, and with the understanding that they could do as they wished with their original works, IBM and Sequent day agreement requiring them to hold in confidence all parts of their modifications and derivative works works the developed and distributed their own and are of their modifications and derivative works as AIX, and Sequent's as Dynix. (See Ex. 492 Ex. 44.) Bursuant to the Agreements, and with the are streament the parties of the extent that the statement suggests that understanding that they could do so shown and subsequent original works. They are a shown as AIX and Sequent (Contracts Mem. ¶ 13-29, 82-86.) Ex. 44.) Bursuant to the Agreements and the Sequent did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 19, 91-92.) "The IBM Agreements and the Sequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 18, 91-92.) "The IBM Agreements and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 18, 91-92.) "The IBM Agreements and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 18, 91-92.) "The IBM Agreements and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 18, 91-92.) "The IBM Agreements and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 18, 91-92.) "Depending on the meaning of the term "their original works," disputed have sealing the parties of their UNIX System V. (Contracts Mem. ¶ 18, 91-92.) Disputed in that there is substantial evidence shown are properated by the parties of their UNIX Bystem V. (Contracts Mem. ¶ 18, 91-92.) Disput		Agreements could only be terminated after 100	conclusion and purports to summarize the	specifically controverts IBM's facts with
Dynix) and an opportunity to cure any breach. Pursuant to the Agreements, and with the restrained AT&T to exercise its 'good faith best efforts to resolve any alleged breach" prior to termination. (Ex. 492 § 6.03; Ex. 121 § 3.03; Ex. 122 ¶ A.5.) Pursuant to the Agreements, and with the restraint the they could do a strey wished with their original works, IBM and Sequent and Sequent and Sequent with their original works, IBM and Sequent and Sequent and Sequent and Sequent as AIX, and Sequent's as Dynix. (See Ex. 492 Sec. 401) Sec. 402. (Contracts Mem. ¶ 15.20, R2.20; AZ, Ex. 119; Ex. 121.) SCO Disputed to the extent that the statement suggests that IBM owns AIX and Dynix. (See Ex. 44.) Ex. 44.) Disputed to the extent the statement suggests that understanding them to hold in confidence all parts of their imodifications and derivative works based on the icensed UNIX System V software programs as AIX, and Sequent (See Ex. 492). Disputed to the extent that the statement suggests and subsequent oral discussion from the agreement, the parties and reached. (Contracts Mem. ¶ 15.20, 12.2 "The IBM Agreements and subsequent oral discussion from the Agreements of UNIX System V." (IBM Statements) set forth the terms under which UNIX System V." (IBM Statements) set forth the terms under which they could disciblence believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 16.3-10) isoptied in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent Dynix/ptx. (Contracts Mem. ¶ 176-96.)		days' notice (for AIX) or 60 days' notice (for	termination provisions of the IBM and Sequent	admissible evidence meeting the requirements of
Furthermore, the Side Letter required AT&T to exercise its "good faith best fforts to resolve any alleged breach" prior to termination. (Ex. 492 § 6.03; Ex. 121 § 3.03; Ex. 122 ¶ A.5.) Pursuant to the Agreements, and with the read of the agreement requiring them to hold in confidence all further developed and distributed their own with their original works. JBM and Sequent and and activative works from the reveloped and distributed their own with their original works. JBM and Sequent and an agreement requiring them to hold in confidence all further developed and distributed their own "flavors" of UNIX software — IBM's was known as AIX, and Sequent 3 as Daylink. (See Ex. 492 product. (Contracts Mem. JF) 1.25 Ka. 21.) SCO Concedes that JBM owns AIX and Dynix. (See Ex. 492 product. (Contracts Mem. JF) 1.91 Parts of the terms under which they could distribute agreement the parties did not intend to recclude any previous and subsequent oral discussion from the agreement the parties find reached. (Contracts Mem. JF) 1.91 Parts of the terms under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Fact § 30.) Depending on the meaning of the term "their original works." disputed in that there is substantial evidence showing (and easily permitting the inference that JBM and Sequent every manual and the second or "UNIX system V." (IBM Statement of Undisputed Fact § 30.) Depending on the meaning of the term "their original works." disputed in that there is substantial evidence showing (and easily permitting the inference that JBM and Sequent parts of their UNIX flavors (Contracts Mem. JF) 16-96.)		Dynix) and an opportunity to cure any breach.	Agreements and the IBM Side Letter.	Rule 56. SCO does not dispute that the
alleged breach" prior to termination. (Ex. 492 § 6.03; Ex. 121 § 3.03; Ex. 122 ¶ A.5.) Pursuant to the Agreements, and with the understanding that they could do as they wished with their original works. IBM and Sequent their owing and stributed their own flavors" of UNIX software—IBM's was known as AIX, and Sequent's as Dynix. (See Ex. 492 § 2.01, 122 ¶ A.2.; Ex. 119; Ex. 121.) SCO Ex. 44.) Ex. 44.) Disputed to the extent the statement suggests that understanding that they were obligated to their modifications and derivative works based on the licensed UNIX System V software product. (Contracts Mem. ¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests concedes that IBM owns AIX and Dynix. (See Ex. 492 Disputed to the extent that no lot in confidence all they were obligated to the terms under which they could dispute agreement, the parties and reached. (Contracts Mem. ¶¶ 19-29, "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on 'UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," signified in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent permitting the inference that IBM and Sequent Permitting the IBM and Se		Furthermore, the Side Letter required AT&T to		referenced paragraph accurately summarizes the
alleged breach? Prior to termination. (E.x. 492.) § 6.03; Ex. 121 § 3.03; Ex. 122 § A.5.) Pursuant to the Agreements, and with the understanding that they could do as they wished with their original works, IBM and Sequent flutther developed and distributed their own further developed and distributed their own based on the licensed UNIX System V software based on the licensed UNIX System V software based on the licensed UNIX System V software product. (Contracts Mem. [if 15.29, 82-86.) § 2.01, 122 ¶ A.2.; Ex. 119; Ex. 121.) SCO Ex. 44.) By an Solvent in the parties and reached. (Contracts Mem. [if 15.29, 82-86.) Ex. 44.) By an Solvent in the parties and reached. (Contracts Mem. [if 15.20, 82-86.) By an System V solvent in the parties and disclosed by them and under which they could distribute software programs.) set forth the terms under which they could distribute software programs. "based on "UNIX System V." (IBM Statements of Undisputed Facts § 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that IBM and Sequent Profice of the product in Alf and Dynix software programs. "Software programs." Set forth the terms under which they could distribute software programs. "based on "UNIX System V." (IBM Statement of Undisputed Facts § 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that IBM and Sequent Profice and Dynix permitting the inference that IBM and Sequent Profice Software products Mem. [f] 76-96.)		exercise its "good faith best efforts to resolve any		provisions of the relevant agreements relating to
Pursuant to the Agreements, and with the understanding that they could do as they wished with their original works, last and with their original works, last wished further developed and distributed their own "flavors" of UNIX software — IBM's was known based on the licensed UNIX System V software as A1X, and Sequent's as Dynix. (See Ex. 492 Disputed to the extent that the statement suggests that upon entering into their witten agreement, the parties find not intend to exclude any previous and subsequent oral discussion from the agreements and subsequent oral discussion from the Agreements (Contracts Men. [7] 19, 91-92.) "The IBM Agreements and the Sequent Agreements (Contracts Men. [7] 19, 91-92.) "The IBM Agreements and the Sequent oral discussion from the agreement the parties find the terms under which UNIX System V." (IBM Statements (Collectively "the Agreements") Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent [7] 19-16.) Disputed in that SCO owns the licensed UNIX software product in AX and Dynix/ptx. (Contracts Men. [7] 16-96.)		alleged breach" prior to termination. (Ex. 492		notice of termination and the requirement that
Pursuant to the Agreements, and with the understanding that they could do as they wished with their original works. JBM and Sequent further developed and distributed their own "flavors" of UNIX software — IBM's was known as AIX, and Sequent is as Dynix. (See Ex. 492 concedes that IBM owns AIX and Dynix. (See Ex. 44.) Ex. 44.) By an Sequent or all sequent or all sequent or all sequents and derivative works based on the licensed UNIX System V software product. (Contracts Mem. If 18-29, 82-86.) Ex. 44.) By an Sequent is as Dynix. (See Ex. 492 concedes that IBM owns AIX and Dynix. (See Ex. 492 concedes that IBM owns AIX and Dynix. (See Ex. 44.) Ex. 44.) By an Sequent is as Dynix. (See Ex. 492 concedes that IBM owns AIX and Dynix. (See Ex. 492 concedes that IBM owns AIX and Dynix. (See Ex. 492 concedes that IBM owns AIX and Dynix. (See Ex. 493 concedes that IBM owns AIX and Dynix. (See Ex. 493 concedes that IBM owns AIX and Dynix. (See Ex. 494.) By an Agreement is a substantial and sequent or all six but the terms under which UNIX System V. (IBM Statement of Undisputed Facis § 50.) Chapter of the extent that the statement suggests that under which are previous and subsequent or all six but the terms under which UNIX System V. (IBM Statements of the term under which UNIX System V. (IBM Statement of Undisputed Facis § 50.) Chapter of the extent that the statement suggests that under which they could distribute software programs "beginned assity permitting the inference that) IBM and Sequent or all parts of their UNIX System V. (IBM Statement of Undisputed In that Roco owns the licensed UNIX software product in AIX and punix pix. (Contracts Mem. If 16-9-9c.)		8 0.03; EX. 121 8 3.03; EX. 122 A.3.)		A L&I exercise its "good faith best efforts to
Pursuant to the Agreements, and with the understanding that they could do as they wished with their original works, IBM and Sequent further developed and distributed their own "flavors" of UNIX software—IBM's was known as AIX, and Sequent's as Dynix. (See Ex. 492 concedes that IBM owns AIX and Dynix. (See Ex. 44.) Ex. 44.) Disputed to the extent that the statement suggests that upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties and reached. (Contracts Mem. ¶fl 19, 91-92.) "The IBM Agreements and the Sequent Agreements (Collectively "the Agreements (Collectively "the Agreements") set forth the terms under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed facts § 5.0) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent physical Contracts Mem. ¶fl 50-163.) Disputed in that SCO course the licensed UNIX Software product in AIX and Dynix (Contracts Mem. ¶fl 60-163.) and the statement suggests that the parties of the term such and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed them "there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent and the statement and the statemen				Nor does SCO identify to what extent the
Pursuant to the Agreements, and with the Disputed to the extent the statement suggests that understanding that they could do as they wished their own with their original works, IBM and Sequent dark their original works, IBM and Sequent dark the role of their modifications and derivative works as AIX, and Sequent's as Dynix. (See Ex. 492 Sec. 11.22 ¶ A.2.; Ex. 119; Ex. 121.) SCO Disputed to the extent that the statement suggests concedes that IBM owns AIX and Dynix. (See Ex. 44.) Ex. 44.) By 91.22 J. "The IBM System V software protection of their written agreement, the parties of not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 19, 91-22). "The IBM Agreements and the Sequent Agreements of UNIX System V." (IBM System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent Dynix permitting the inference that) IBM and Sequent Dynix permitting the inference that) IBM and Sequent Dynix of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX Software Product in AIX and Dynix permitting the original works," disputed to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 64-163.) Disputed in AIX and Dynix permitting the inference that IBM and Sequent Dynix permitti				referenced paragraph states a legal conclusion.
IBM and Sequent did not enter into a written agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (Contracts Mem. ¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynixptx. (Contracts Mem. ¶ 176-96.)	12.	Pursuant to the Agreements, and with the	Disputed to the extent the statement suggests that	Deemed admitted: Nothing in SCO's statement
agreement requiring them to hold in confidence all parts of their modifications and derivative works based on the licensed UNIX System V software product. (Contracts Mem. ¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶¶ 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynixptx. (Contracts Mem. ¶¶ 76-96.)		understanding that they could do as they wished	IBM and Sequent did not enter into a written	specifically controverts IBM's facts with
parts of their modifications and derivative works based on the licensed UNIX System V software product. (Contracts Mem. ¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynixptx. (Contracts Mem. ¶ 76-96.)		with their original works, IBM and Sequent	agreement requiring them to hold in confidence all	admissible evidence meeting the requirements of
product. (Contracts Mem. ¶¶ 13-29, 82-86.) Disputed to the extent that the statement suggests that, upon entering into their written agreement, the parties did not intend to exclude any previous and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶¶ 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynixptx. (Contracts Mem. ¶¶ 76-96.)		further developed and distributed their own	parts of their modifications and derivative works	Rule 56, and the material referred to by SCO
		"flavors" of UNIX software — IBM's was known	based on the licensed UNIX System V software	does not support SCO's statement.
		as AIX, and Sequent's as Dynix. (See Ex. 492	product. (Contracts Mem. [7] 13-29, 82-86.)	
		§ 2.01, 122 ¶ A.2.; Ex. 119; Ex. 121.) SCO	Disputed to the extent that the statement suggests	
		concedes that IBM owns AIX and Dynix. (See	that, upon entering into their written agreement,	
and subsequent oral discussion from the agreement the parties had reached. (Contracts Mem. ¶ 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owas the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)		Ex. 44.)	the parties did not intend to exclude any previous	
agreement the parties had reached. (Contracts Mem. ¶ 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			and subsequent oral discussion from the	
Mem. ¶ 19, 91-92.) "The IBM Agreements and the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V. (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			agreement the parties had reached. (Contracts	
the Sequent Agreements (collectively "the Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 176-96.)			Mem. ¶ 19, 91-92.) "The IBM Agreements and	
Agreements") set forth the terms under which UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/pfix. (Contracts Mem. ¶ 76-96.)			the Sequent Agreements (collectively "the	
UNIX System V could be used and disclosed by them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors, (Contracts Mem. ¶ § 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			Agreements") set forth the terms under which	
them and under which they could distribute software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ § 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			UNIX System V could be used and disclosed by	
software programs "based on" UNIX System V." (IBM Statement of Undisputed Facts ¶ 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ § 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			them and under which they could distribute	
(IBM Statement of Undisputed Facts § 50.) Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. § § 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. § 76-96.)			software programs "based on" UNIX System V."	
Depending on the meaning of the term "their original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors, (Contracts Mem. \$\psi\\$ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. \$\psi\\$ 76-96.)			(IBM Statement of Undisputed Facts § 50.)	
original works," disputed in that there is substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors, (Contracts Mem. \$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\			Depending on the meaning of the term "their	
substantial evidence showing (and easily permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. \$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\\$\			original works," disputed in that there is	
permitting the inference that) IBM and Sequent believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶ (63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			substantial evidence showing (and easily	
believed they were obligated to hold in confidence all parts of their UNIX flavors. (Contracts Mem. ¶¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶¶ 76-96.)			permitting the inference that) IBM and Sequent	
all parts of their UNIX flavors. (Contracts Mem. ¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			believed they were obligated to hold in confidence	
¶ 63-163.) Disputed in that SCO owns the licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶ 76-96.)			all parts of their UNIX flavors. (Contracts Mem.	
licensed UNIX software product in AIX and Dynix/ptx. (Contracts Mem. ¶¶ 76-96.)			¶ 63-163.) Disputed in that SCO owns the	
Dynix/ptx. (Contracts Mem. ¶ 76-96.)			licensed UNIX software product in AIX and	
	***************************************	a Volument and American Control of Control o	Dynix/ptx. (Contracts Mem. ¶ 76-96.)	

13.	Both AIX and Dynix, which IBM owns	Disputed in that the cited material does not	Deemed admitted: (1) SCO's statement does not
	millions of lines of code, including code written	identify what lines of code in AIX or Sequent	refer with particularity to those portions of the
	by IBM and Sequent software engineers (or	were written by developers without exposure,	record on which SCO relies for its contention
	outside contractors retained by them), and also	reference or access, or experience based on such	that IBM's numerical comparisons are not
		exposure, reference or access, to the licensed	"technically sound". SCO's reference consists
	or Sequent for inclusion in AIX or Dynix. (See	UNIX System V software product.	of citations to the entire content of three of its
	Ex. 236 ¶ 4-5; Ex. 269 ¶ 3-5; Ex. 414 at 22.)		proposed expert reports, which consist of 308
	December 22, 2005 Final Diodoctors of Material		pages of technical material exclusive of exhibits.
	Allegedly Misused by IBM ("Final Disclosures")	SECTION REDACTED	(2) SCU's statement does not refer to any nortion of the record on which SCO relies for its
	that IBM has misused constitutes only a		contention that IBM had the burden to identify
	negligible proportion of this code. (See K Br.		material in AIX and Dynix that is not derived
	¶231.) For example, AIX 5.1.G for Power		from System V. On the contrary, SCO was
	consists of more than 160 million lines of source		specifically ordered "to provide and identify all
	code, while the "Journaled File System" ("JFS")		specific lines of code from Unix System V from
	material allegedly misused by IBM amounts to		which IBM's contributions from AIX or Dynix
	only 11,170 lines of code from AIX — i.e., less		are alleged to be derived". (IBM Ex. 56 ¶ 3.)
	than 0.01% of AIX 5.1.G. for Power. (See		
		The second secon	
7.		Disputed. Novell sold the UNIX copyrights to	Deemed admitted: Nothing in SCO's statement
	sold some but not all of AT&T's INIX assets to	Santa Cruz under me AFA. (11 51-70.)	specifically controverts IBM's facts with
	Sold Solife, Dut 110t all, Of A 10c. 1 S CIVIA ASSETS TO		admissible evidence meeting the requirements of
	Santa Cruz in 1995. Among other things, Novell retained all of AT&T's UNIX convrights pursuant		Rule 56. Further, the Asset Purchase Agreement unambiguously provides that Novell retained all
	to an Asset Purchase Agreement ("APA") dated		of AT&T's UNIX copyrights, (See Ex. 123
	as of September 19, 1995. (See Ex. 123		Art. 1.1(a), Sched. 1.1(b).)
15.		Disputed. Novell's and IBM's intent in the	Deemed admitted: Nothing in SCO's statement
	its UNIX licensing agreements for the purpose of	transaction at issue was to permit IBM to buy-out	specifically controverts IBM's facts with
	acquiring non-terminable rights to distribute AIX.	its obligation to pay binary royalties on its	admissible evidence meeting the requirements of
	(See Ex. 160 M 7-16; Ex. 163 M 5-7.) IBM	distributions of AIX, not to give IBM a	Rule 56.
	wanted to invest further in AIX and develop its	nonterminable right to use AIX. (¶ 13-22.)	
	AIX business, but it did not wish to do so without	Amendment No. X specifically states that the	
	AIX. (See Ex. 256 ¶ 13.)	purpose of the amendment is to "simplify the royalty obligations." (IBM Ex. 124.)	
	With the second	AND THE RESIDENCE AND THE PARTY OF THE PARTY	A COLUMN TO THE PROPERTY OF TH

100	BM's Statement		
16.	┞	4's intended meaning of the	Deemed admitted: (1) Nothing in SCO's
	effect a royalty buy-out, thereby eliminating the	term "irrevocable, fully paid up, and perpetual,"	statement specifically controverts IBM's facts
	need to maintain a team to audit the required	disputed to the extent the statement suggests that	with admissible evidence meeting the
	annual royalty payments; make IBM's rights	IBM's, Novell's and Santa Cruz's intent in the	requirements of Rule 56 and (2) the material
	under the Agreements irrevocable, fully paid-up,	transaction at issue was to give IBM a non-	referred to by SCO does not support SCO's
	and perpetual; make it easier to redistribute	terminable right to use AIX. (¶ 13-22.)	statement.
	licensed source code to contractors and customers		
	for limited purposes; and loosen the		
	confidentiality restrictions in the Agreements.		
	See id. 8; Ex. 72 19; Ex.		
<u>'</u>	Novell was represented by A. Allison Amadia and	Disputed to the extent the statement suggests that	Deemed admitted: (1) Nothing in SCO's
	to the modification of IBM's IMIX Licensing	only ones involved in the negotiations or whose	with admissible evidence meeting the
	Agreements. (Ex. 160 ¶ 9; Ex. 172 ¶ 18.) IBM	intent reflects the intent of the parties. (¶¶ 13-22.)	requirements of Rule 56 and (2) the material
	was represented by William Sandve, Kenneth		referred to by SCO does not support SCO's
	Stokes, and Paul D. Vincis. (See Ex. 256 § 9.)		statement.
	To the extent Santa Cruz expressed its views		
	during the negotiations, it was by and through		
	Novell. (See Ex. 163 9 8, 10; Ex. 160 9 7, 19,		
	+	And in the contract of the con	
<u>∞</u>	_	Disputed. IBM's, Novell's and Santa Cruz's intent	Deemed admitted: Nothing in SCO's statement
	wanted a non-terminable licensc. (Ex. 163 ¶ 7.)	in the transaction at issue was not to give IBM a	specifically controverts IBM's facts with
	In IBM's view, it made no sense to undertake	non-terminable right to use AIX. (¶¶ 13-22.)	admissible evidence meeting the requirements of
	significant further investment in AIX absent the		Rule 56.
	assurance that no one could terminate its rights to		
	use AT&T's software, and thereby hold hostage		
	IBM's AIX business. (See Ex. 256 ¶ 13; Ex. 160		
	[] 14.)		
19.		Disputed in that there is substantial evidence	Deemed admitted: Nothing in SCO's statement
	non-refundable payment for what was, even in	showing (and easily permitting the inference) that	specifically controverts IBM's facts with
	1996, very old software, IBM's rights under the	IBM made no such statement in the course of the	admissible evidence meeting the requirements of
	Agreements could never be terminated under any	negotiations. (¶ 13-22.) Disputed to the extent the	Rule 56.
	circumstances. (See Ex. 256 13; Ex. 160 14.)	statement purports to describe the intent of the	
	Annual Marie de Annual Marie d	Parities: (12 thr.)	

	THE RESIDENCE OF THE PROPERTY	SCO's Kesnonse	
20.	ļ	Disputed in that IBM's, Novell's and Santa Cruz's	Deemed admitted: Nothing in SCO's statement
	neither Novell nor Santa Cruz (nor their	intent in the transaction at issue was not to give	specifically controverts IBM's facts with
	successors or assigns) could: terminate IBM's	IBM a non-terminable right to use AIX. (¶¶ 13-	admissible evidence meeting the requirements of
	rights under the Agreements; demand any	22.) Disputed in that the parties' intent was not to	Rule 56.
	additional royalty payments beyond the agreed-	preclude Santa Cruz from terminating IBM's	
	upon amount in connection with IBM's	rights under the Agreements upon what Santa	
	distribution of its AIX operating system product	Cruz determined to be a material breach of the	
	on specified architectures (and, after five years,	Agreements. (¶ 13-22.)	
	other sublicensed products); or interfere with the		
	proper exercise of IBM's rights under the		
	Agreements. (See Ex. 256 ¶ 13; Ex. 160 ¶ 14; Ex.		
21.		Disputed. IBM was not given a non-terminable	Deemed admitted: Nothing in SCO's statement
	terminable license. However, IBM persisted in	right to use AIX. (¶ 13-22.)	specifically controverts IBM's facts with
	the request, and Novell ultimately agreed to grant		admissible evidence meeting the requirements of
	IBM a non-terminable license. (Ex. 160 m 11,		Rule 56.
	18; Ex. 172 ¶ 21; Ex. 163 ¶ 8.)		
22.	The only limitation on its rights to which IBM	Disputed, IBM was not given a non-terminable	Deemed admitted: (1) Nothing in SCO's
	would agree was that Novell would retain the	right to use AIX. (¶¶ 13-22.)	statement specifically controverts IBM's facts
	right to enjoin or otherwise prohibit IBM from		with admissible evidence meeting the
	violating Novell's rights under the amendment,		requirements of Rule 56, and (2) Amendment X
	=		unambiguously provides IBM with a non-
	copyright, or trademark law. (Ex. 160 14;		terminable license.
	Ex. 163 ¶ 13; Ex. 182 ¶ 51.)		
23.	On April 26, 1996, 1BM and Novell (on behalf of	Disputed. IBM was not given a non-terminable	Deemed admitted: Nothing in SCO's statement
	itsell and Santa Cruz) entered into an amendment	right to use AIX. (11 13-22.) Disputed to the	specifically controverts IBM's facts with
	to IBM's UNIX licensing agreements (the "April	extent the statement suggests that the April 1996	admissible evidence meeting the requirements of
	1996 Amendment"), The April 1996	Amendment uses the term "nonterminable," which	Rule 56.
	Amendment, among other things, provided IBM a	it does not.	
	non-terminable license. (See Ex. 256 ¶ 20;		and the control of th
	Ex. 100 1 10, 20-22; Ex. 1/2 22; Ex. 382 at 1.)		

24.	Section I of the April 1996 Amendment stated that, upon payment of the consideration contemplated in the Agreement, IBM would have the "irrevocable, fully paid-up, perpetual right to exercise all of its rights under the [Agreements]" (Ex. 582 at 1.) IBM and Novell intended and understood the April 1996 Amendment to render IBM's UNIX licenses nonterminable. (Ex. 160 § 35; Ex. 256 § 22.)	Disputed. IBM was not given a non-terminable right to use AIX. (¶ 13-22.)	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56.
25.	Santa Cruz raised no objections during the negotiation of the April 1996 Amendment, but after it was executed, Santa Cruz objected, on the grounds that the Amendment constituted a breach by Novell of the APA, and was an improper exercise of Novell's authority. (Ex. 583; Ex. 172 ¶ 23.)	Disputed in that Santa Cruz objected during the negotiations. (Exs. 330, 357, 358, 359.)	SCO's response does not create a genuine issue of fact; no purportedly controverted fact is material to IBM's motion.
26.	Novell disagreed with Santa Cruz's objection, but undertook to resolve Santa Cruz's concerns, since Novell believed it had authority to execute the April 1996 Amendment. (See Ex. 256 § 26; Ex. 172 § 23.)	Disputed in that there is substantial evidence showing (and easily permitting the inference) that Novell did not believe after the April 1996 Amendment that it had authority to execute the April 1996 Amendment, including Amendment No. 2 to the APA. (¶¶ 13-22; IBM Ex. 44; Ex. 50 ¶¶ 29-33.)	Deemed admitted: (1) Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56, (2) the material referred to by SCO does not support SCO's statement and (3) SCO Ex. 50 ¶ 30-33 actually supports IBM's statement.
27.	Pursuant to a "standstill agreement" with Santa Cruz, IBM and Novell therefore agreed to refrain from acting under certain sections of the April 1996 Amendment for a period of thirty days. The standstill agreement was extended several times pending negotiations with Santa Cruz. (See Ex. 256 ¶ 26.)	Undisputed.	Undisputed.
28.	Novell negotiated separately with IBM and with Santa Cruz to resolve Santa Cruz's concerns. (See id.; Ex. 172 ¶ 25.) IBM did not deal directly with Santa Cruz during the negotiations. Santa Cruz authorized Novell to act on its behalf. (See Ex. 256 ¶ 26.)	Disputed to the extent the statement suggests that Santa Cruz agreed to accept whatever terms Novell wanted to negotiate with IBM, which statement the cited material does not support, and which statement is not accurate. (IBM Ex. 585 at 13.)	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56.

	JBMC Sugarent		
29.	Thegotiations, IBM continued inable rights, and Novell IBM that there would be no of the parties' agreement. (See	e evidence shows (and easily ce) that IBM had not insisted terminable rights in the April Novell did not believe that such rights in the April 1996 Novell did not represent to IBM a such rights in the subsequent 50 ¶ 29-38.) Disputed to the it suggests that the April 1996 he term "non-terminable",	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56.
30.	Santa Cruz sought to revise the language of the irrevocability provision by, among other things, making it "subject to the provisions of this Amendment". (Id. ¶ 27; Ex. 163 ¶ 9.) IBM, however, rejected this proposal, and Santa Cruz ultimately agreed to let the irrevocability provision stand as written in the April 1996 Amendment. (Ex. 256 ¶ 30.)	Disputed to the extent the statement suggests that the "irrevocability provision" in Amendment No. X afforded IBM "non-terminable" rights in its Agreement, or that Novell or Santa Cruz believed the "irrevocability provision" afforded IBM any such right. (¶ 13-22.)	Deemed admitted: (1) Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56, (2) the material referred to by SCO does not support SCO's statement and (3) Amendment X unambiguously provides IBM with a non-terminable license.
31.	At no point after this did Novell suggest that IBM's license would be terminable. (Ex. 163 ¶ 9.) At no point in the negotiations did IBM indicate a willingness to back off of the position that it must have a non-terminable license. (Id.; see Ex. 256 ¶ 8-14, 17, 29-30.)	Disputed. IBM was not given a non-terminable right to use AIX. (¶ 13-22.) Disputed to the extent the statement suggests that the April 1996 Amendment uses the term "nonterminable," which it does not. Disputed to the extent the statement suggests that Santa Cruz had lacked the rights to enforce the Agreements. (Contracts Mem. ¶ 169-82.)	Deemed admitted: (1) Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56, and (2) Amendment X unambiguously provides IBM with a nonterminable license.
32.	Santa Cruz also sought to: (i) impose right-to-use fees on IBM contractors and customers who were provided licensed source code; and (ii) prevent IBM employees who had gained access to licensed source code from memorializing concepts, know-how, or techniques embodied in that code. (Ex. 256 ¶ 29.)	Undisputed.	Undisputed.

		Scor Response	
33.	ĺ.	Undisputed.	Undisputed.
	ultimately did agree to a provision limiting its		
	right to provide contractors and customers with		
	copies of licensed source code to a specified		
	number of copies (fifty) at a time. (Id.) In		
	exchange for IBM's concession, Novell agreed to		
	accept \$350,000 less than it otherwise was		
	entitled to as royalty payments, pursuant to an		
	October 16, 1996 Letter Agreement between IBM		
	and Novell. (Id. § 30; Ex. 172 § 26; Ex. 143.)		
34.		Depending on the meaning of "substantially	Deemed admitted: Nothing in SCO's statement
	IBM executed Amendment No. X, which was	similar," disputed to the extent the statement	specifically controverts IBM's facts with
	substantially similar to, but replaced, the April	suggests that, as reflected in the two documents,	admissible evidence meeting the requirements of
	1996 Amendment. (Ex. 124 at 1; see Ex. 163	there were no material differences between the	Rule 56.
	11.)	two documents, or that either of them gave IBM	
	The state of the s	"non-terminable" rights in the event of a breach.	
35.		Undisputed.	Undisputed.
	that, as part of the sale by Novell of its UNIX		•
	assets to Santa Cruz, "SCO purchased, and Novell		
	retained, certain rights with respect to" the		
	agreements IBM entered into with AT&T,		
	including "Software Agreement SOFT-00015 as		
	amended" and "Sublicensing Agreement SUB-		
	00015A as amended". (Ex. 124 at 1.)		

39.	Under Section 1 of Amendment No. X, Novell and Santa Cruz agreed to grant IBM the following rights, in exchange for a payment of \$10,125,000. No Additional Royalty. Upon payment to SCO of the consideration in the section entitled "Consideration", IBM will have the irrevocable, fully paid-up, perpetual right to exercise all of its rights under the [Agreements] beginning January 1, 1996 at no additional royalty fee Notwithstanding the above, the irrevocable nature of the above rights will in no way be construct to limit Novell's or SCO's rights to enjoin or otherwise prohibit IBM from violating any and all of Novell's or SCO's rights under this Amendment No. X, the [Agreements], or under general patent, copyright, or trademark law. (Id. §§ 1, 4.)	Undisputed.	Undisputed.
37.	Section 1 of Amendment No. X superseded the term and termination provisions of the Agreements. (See, e.g., Ex. 492 § VI; Ex. 120 § III; Ex. 122 ¶ A.5.; see Ex. 256 ¶ 22; see also Ex. 124 § 11 (providing that the terms and conditions of the Agreements will remain in effect "[e]xcept as modified herein").)	Disputed in that Amendment No. X did not modify the termination provisions of the IBM source code Agreement. (¶ 13-22.)	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56. Further, Amendment X unambiguously superseded the term and termination provisions of the Agreements.
38.	In granting IBM an irrevocable and perpetual license, Amendment No. X gave IBM a non-terminable license. IBM's license under the Agreements cannot be terminated for any reason. (See Ex. 256 ¶ 33; Ex. 160 ¶ 35.)	Disputed. Amendment No. X did not give IBM a non-terminable license. (¶¶ 13-22.)	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56. Further, Amendment X unambiguously provides IBM with a non-terminable license.
39.	Although Novell and Santa Cruz retained the right to enjoin or otherwise prohibit any conduct in violation of the amended Agreements, or under general patent, copyright, or trademark law (as long as they could meet the standards for obtaining that relief), neither Novell, Santa Cruz, nor anyone else had the right to terminate IBM's rights under the Agreements. (Ex. 256¶33; Ex. 160¶35; Ex. 163¶14.)	Disputed in that Amendment No. X did not give IBM a non-terminable license (¶¶ 13-22), and disputed in that Novell did not retain the aforementioned rights (Contracts Mem. ¶¶ 169-82). Undisputed to the extent the statement acknowledges that Santa Cruz could "otherwise" prohibit IBM's breach of the Agreements by terminating them.	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56.

	IBM's Swiement		
40.	After Amendment No. X, Novell and Santa Cruz	mendment No. X did not give	Deemed admitted: Nothing in SCO's statement
	could no longer terminate IBM's rights to copy	IBM a non-terminable license (¶ 13-22), and	specifically controverts IBM's facts with
	and furnish sublicensed products that included	disputed in that Novell did not retain the	admissible evidence meeting the requirements of
	material from UNIX System V Release 3.2 and	aforementioned rights (Contracts Mem. ¶ 169-	Rule 56.
	previous releases, such as AIX, if IBM were to	91).	
	improperly disclose the licensed source code in		
	breach of the Agreements. However, Novell or		
	Santa Cruz could attempt to enjoin improper		
	disclosures. (Ex. 256 § 33; Ex. 160 § 35; Ex. 163		
=	1 14.)		
÷	All of the persons who hegoliated Americanell	Disputed. (13-22.) Disputed to the extent the	Deemed admitted: Nothing in SCO's statement
-	NO. A OII OCITATI OI IDINI AIIU NOVOII ARICC IIIAI IIIC	statement Suggests trial Santa Cruz did not	specifically confroverts IBM's facts with
	parties intended for IBIVI to obtain a non-	participate in the negotiations and to the extent the	admissible evidence meeting the requirements of
	terminable license. (See Ex. 256 11 13, 35;	statement suggests as a legal conclusion that, as a	Rule 56.
	Ex. 160 (114, 37; Ex. 172 (128.)	party to Amendment No. X, Santa Cruz's	
		understanding and intent with respect to	
		Amendment No. X is irrelevant.	
42.	IBM and Novell intended and understood that	Disputed in that in Amendment No. X IBM and	Deemed admitted: Nothing in SCO's statement
	Amendment No. X was to effect a royalty buy-out	Novell did not intend to give IBM a	specifically controverts IBM's facts with
	for a lump sum payment, and thereby give IBM	nonterminable license. (¶¶ 13-22.) Disputed to the	admissible evidence meeting the requirements of
	rights that could not be revoked or terminated for	extent the statement suggests that Santa Cruz did	Rule 56.
	any purpose. (See Ex. 160 § 35; Ex. 256 § 33.)	not participate in the negotiations and to the extent	
	No one ever communicated any contrary intent to	the statement suggests as a legal conclusion that,	
****	IBM or Novell. (See Ex. 160 ¶ 35; Ex. 256 ¶ 33.)	as a party to Amendment No. X, Santa Cruz's	
*******		understanding and intent with respect to	
Ì	The second secon	Amendment No. X is irrelevant.	
43.	Any argument that IBM's rights are terminable is	Disputed. Amendment No. X does not give IBM a	Deemed admitted: Nothing in SCO's statement
	inconsistent with the language of Amendment No.	non-terminable license: it does not use that	specifically controverts the facts IBM states in
	X and the understanding of the people who	language, and substantial evidence confirms that	the referenced paragraph with admissible
	negotiated the April 1996 Amendment and	IBM's license could be terminated for breach.	evidence meeting the requirements of Rule 56.
	Amendment No. X. Termination is no longer a	(¶ 13-22.)	
	35; EX. 160 14, 37; EX. 172 28; EX. 182		•
-	24.		

	BM.Suchen	(SCO)s Response	
44.	When advised that SCO, which was not involved	dment No. 3	Deemed admitted: (1) Nothing in SCO's
	in negotiating the April 1996 Amendment or	IBM a non-terminable license. (¶ 13-22.)	statement specifically controverts IBM's facts
_	Amendment No. X, had threatened to terminate	Disputed in that the facts that IBM's rights are	with admissible evidence meeting the
	IBM's rights under the Agreements based on	terminable is consistent with the understanding of	requirements of Rule 56, and (2) the material
	alleged breaches by IBM of the Agreements, Ms.	people who negotiated the April 1996 Amendment	referred to by SCO does not support SCO's
	Amadia stated that she did not believe that IBM's	and Amendment No. X. (¶ 13-22.) Disputed to	statement.
	rights under the Agreements were terminable.	the extent the statement suggests that Santa Cruz	
	She stated that, to her mind, any argument that	did not participate in the negotiations and to the	
	IBM's rights were terminable was inconsistent	extent the statement suggests as a legal conclusion	
*********	with the language of Amendment No. X, and the	that, as a party to Amendment No. X, Santa	
	understanding of the parties who negotiated the	Cruz's understanding and intent with respect to	
	April 1996 Amendment and Amendment No. X.	Amendment No. X is irrelevant. Disputed to the	
	Because the termination right was contracted	extent the statement suggests that the word "non-	
	away in both the April 1996 Amendment and	terminable" appears in the April 1996 Amendment	
	Amendment No. X, termination was no longer a	or Amendment No. X, which it does not.	
_	remedy. (Ex. 160 ¶ 37.)		
45.	In 2001, approximately five years after	Disputed in that the cited material does not	SCO's response does not create a genuine issue
	Amendment No. X, Caldera International	support the second part of the statement. Disputed	of fact; no point purportedly controverted is
	("Caldera") acquired most, if not all, of the UNIX	in that SCO's business model was not based upon	material to IBM's motion.
	assets owned by Santa Cruz. After failing to	litigation; rather, SCO was attempting to protect	
	make a profit, Caldera switched management,	its intellectual property just as IBM and many	
	changed its name to SCO, and adopted a business	companies do. (Ex. 165 11 31.37.)	
	model based upon litigation. (See Ex. 123.)		
. 66	On March 6, 2003, SCO commenced this lawsuit	Disputed in that the statement does not accurately	The facts stated in IBM's referenced paragraph
	against IBM, alleging in general terms that IBM	summarize SCO's allegations in its Complaint and	are fully supported by the cited material. For
******	improperly "dumped" UNIX source code into the	in that the cited material does not support the	example, Ex. 1 ¶ 102 states that "IBM is
	publicly available Linux operating system. (See	statement.	affirmatively taking steps to destroy all value of
	Ex. 1 1 82-103.)		UNIX by improperly extracting and using the
			confidential proprietary information it acquired
			from UNIX and dumping that information into
			the open source community", and Ex. 1 ¶ 99
			accuses IBM of "improper extraction, use, and
			dissemination of the proprietary and confidential
_(UNIX Software Code".

			IBMKRUP
47.	Linux is an "open source" program, which means, among other things, that its source code is publicly available and royalty-free, and that users have the freedom to run, copy, distribute, study, adapt, and improve the software. (See Ex. 5¶22; Ex. 64¶8.) Indeed, the source code for Linux is publicly available for download on the Internet. (See Ex. 5¶22;	Undisputed.	Undisputed.
	At the same time SCO served its complaint, SCO sent a letter to IBM threatening to terminate its rights to distribute AIX and Dynix based on IBM's alleged breach of its licensing agreements. (Ex. 153.) In a March 7, 2003 press release, SCO publicized the letter, and publicly repeated its threat to terminate IBM's rights. (Ex. 592.)	Depending ou the meaning of the term "threat" and "threatening", disputed to the extent the statement draws a legal conclusion in suggesting that SCO was outside its rights in sending the letter and issuing the press release.	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56.
49,	SCO similarly sought to terminate Sequent's rights to use and distribute Dynix. By way of a letter dated May 29, 2003, SCO purported to notify Sequent of the alleged breaches, and gave Sequent until September 2, 2003 to remedy any alleged breaches. Without waiting until September 2, 2003, SCO later sent a purported letter of termination dated August 11, 2003, and claimed that the Dynix licenses had been terminated as of July 30, 2003. (See Ex. 154; Ex. 155.)	Disputed in that in the letter dated May 29, 2003, SCO stated that "we will provide you two (2) months to remedy all violations of the AT&T/Sequent Agreements," and two months from May 29, 2003, was July 29, 2003. Disputed to the extent the statement suggests that SCO was obligated to provide more than two (2) months' notice under the Sequent Agreements.	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56.

	IBM's Statement	SCOLETAINS.	
50.	Neither SCO's letters nor its complaint described	Disputed. The letters and Complaint together	Deemed admitted: Nothing in SCO's statement
	SCO's specific allegations of misconduct by IBM	described in detail the general conduct that	specifically controverts IBM's facts with
	in any detail. (See Ex. 1; Ex. 2 at 153.) As a	constituted a breach of the Agreements and gave	admissible evidence meeting the requirements of
	result, SCO did not give IBM reasonable notice of	those specific examples that SCO had been able to	Rule 56.
_	SCO's claims, or a reasonable opportunity to	uncover. (¶ 23-50.) SCO thus gave IBM	
	cure. (See Ex. 492 § 6.03; Ex. 120 §§ 2.07, 3.03;	reasonable notice of SCO's claims and a	
	Ex. 122 (A.5.)	reasonable opportunity to cure. Disputed to the	
		extent the statement draws a legal conclusion.	
-		Disputed to the extent the statement suggests that	
		IBM ever suggested in any way after the filing of	
		the lawsuit that the Agreements were terminable	
		and therefore that the company had any obligation	
		"to cure" at all. (¶¶ 23-50.) Disputed to the extent	
		the statement suggests as a legal conclusion that	
		the several discussions and meetings SCO had	
		with IBM to discuss the problems that SCO had	
		with IBM's conduct before the filing of the	
		lawsuit are irrelevant with respect to the	
		reasonable notice of SCO's claims and a	
		reasonable opportunity to cure.	
51.	SCO's purported termination letter referred only	Disputed in that the statement does not accurately	Deemed admitted: Nothing in SCO's statement
	to breaches of "trade secret" confidentiality. (Ex.	summarize SCO's termination letter or the	specifically controverts IBM's facts with
	153.) SCO, however, amended its complaint to	complaint that was filed at the same time, or the	admissible evidence meeting the requirements of
	eliminate any trade secret claims, and later	prior discussions between the parties. Disputed to	Rule 56.
	admitted that it had no colorable trade secret	the extent the statement suggests that SCO's	
	claims: "There is no trade secret in UNIX System	termination letter did not give IBM notice of	
	[V] files. That is on the record. No problem with	SCO's view that IBM had breached its	
	that." (Ex. 414 at 46.)	Agreements, and to the extent the statement draws	
		a legal conclusion.	

		T & CO. V. R. Carban Ca.	
52.	In order to give IBM an opportunity to curr	l" position	Deemed admitted: Nothing in SCO's statement
	asked SCO to identify the alleged breaches of the	was that the Agreements could not be terminated,	specifically controverts IBM's facts with
	Agreements, both in person through counsel on	such that IBM did not believe it had any	admissible evidence meeting the requirements of
	June 2, 2003, and via letters of April 2, 2003,	obligation "to cure" at all. (¶¶ 23-50.) Disputed to	Rule 56.
	May 5, 2003, June 13. 2003, and August 14,	the extent the statement suggests that SCO had not	
	2003. (See Ex. 580; Ex. 156; Ex 157; Ex. 158;	informed IBM and that IBM did not understand	
	Ex. 159.)	SCO's interpretation of the Agreements and how	
		SCO believed IBM had breached them, and to the	
		extent the statement suggests that IBM had not	
		decided that it simply disagreed with SCO's	
		interpretation of the Agreements. (¶¶ 23-50.)	
		Disputed to the extent the statement suggests that	
		in any letter or during any meeting IBM ever	400
		stated or otherwise suggested (a) that IBM was	
		retracting its statement that it was willing to open-	
		source any part of AIX, (b) that IBM denied that it	
		had made contributions to Linux from AIX and	
		Dynix/ptx, (c) that IBM thought it was a violation	
		of its UNIX Agreements to contribute source code	
		from AIX or Dynix/ptx to Linux, (d) that IBM	
		believed SCO had access to AIX or Dynix/ptx	
_		source code, (e) that IBM could not determine	
		from its own employees what contributions they	
_		had made to Linux, including from AIX and	
		Dynix/ptx, or (f) that IBM was willing "to cure"	
		its breaches by somehow removing, for example,	
		JFS or EVMS from Linux. (¶¶ 23-50.)	

54. II	. ≥	Disputed to the extent the statement suggests that the Agreements were non-terminable, that SCO had not informed IBM and that IBM did not admissible evidence	Deemed admitted: Nothing in SCO's statement
TO 9. E E E 4. E	believe that the license rights granted under the agreements are terminable. (Ex. 580 at 1.) IBM	the Agreements were non-terminable, that SCO had not informed IBM and that IBM did not	enecifically controverte IBM's facts with
9555	agreements are terminable". (Ex. 580 at 1.) IBM	had not informed IBM and that IBM did not	specifically collegive in this states will
E E E Q E			admissible evidence meeting the requirements of
	noted that SCO had filed its complaint without	understand SCO's interpretation of the	Rule 56.
C 4 C	notifying IBM, and that SCO's purported	Agreements and how SCO believed IBM had	
▼ □	notification of IBM's alleged breach of the	breached them, or that IBM had not decided that it	
===	Agreements "do[es] not specify IBM's alleged	simply disagreed with SCO's interpretation of the	
	misconduct". (Id.)	Agreements. (¶ 23-50.) Disputed to the extent the	
		statement suggests that in the letter IBM stated or	
		otherwise suggested (a) that IBM was retracting	
·····		its statement that it was willing to open-source any	
		part of AIX, (b) that IBM denied that it had made	
		contributions to Linux from AIX and Dynix/ptx,	
		(c) that IBM thought it was a violation of its	
		UNIX Agreements to contribute source code from	
		AIX or Dynix/ptx to Linux, (d) that IBM believed	
		SCO had access to AIX or Dynix/ptx source code,	
		(e) that IBM could not determine from its own	
		employees what contributions they had made to	
		Linux, including from AIX and Dynix/ptx, or (f)	
		that IBM was willing "to cure" its breaches by	
_		somehow removing, for example, JFS or EVMS	
		from Linux. (¶ 23-50.)	

	IBM's Sustainent	SCO's Remouse	
55.	IBM therefore asked SCO to specify: (1) any	Disputed to the extent the statement suggests that	Deemed admitted: Nothing in SCO's statement
	products, code, files, trade secrets and/or	SCO had not informed IBM and that IBM did not	specifically controverts IBM's facts with
	confidential information that SCO believed IBM	understand SCO's interpretation of the	admissible evidence meeting the requirements of
	had improperly used, transferred, disposed of or	Agreements and how SCO believed IBM had	Rule 56.
	disclosed; (2) the ways and specific instances in	breached them, or that IBM had not decided that it	
	which SCO alleged IBM had improperly used,	simply disagreed with SCO's interpretation of the	
	transferred, disposed of or disclosed any products,	Agreements. (11 23-50.) Disputed to the extent the	
	code, files, frade secrets and/or confidential	statement suggests that in the letter IBM stated or	
	information; and (3) the steps that SCO believed	otherwise suggested (a) that IBM was retracting	
	IBM was required to take to cure the alleged	its statement that it was willing to open-source any	
	breaches and injuries about which SCO	part of AIX, (b) that IBM denied that it had made	
	complained. (<u>Id.</u> 1-2.)	contributions to Linux from AIX and Dynix/ptx,	
		(c) that IBM thought it was a violation of its	
		UNIX Agreements to contribute source code from	
		A1X or Dynix/ptx to Linux, (d) that IBM believed	
		SCO had access to AIX or Dynix/ptx source code,	
		(e) that IBM could not determine from its own	
		employees what contributions they had made to	
		Linux, including from AIX and Dynix/ptx, or (f)	
		that IBM was willing "to cure" its breaches by	
		somehow removing, for example, JFS or EVMS	
		from Linux. (91 23-50.)	
56.	SCO, however, refused to provide IBM with this	Disputed to the extent the statement suggests that	Deemed admitted: Nothing in SCO's statement
	information, and instead wrote to IBM and stated	SCO had not informed IBM and that IBM did not	specifically controverts IBM's facts with
	that, "If you would like further written	understand SCO's interpretation of the	admissible evidence meeting the requirements of
	information regarding IBM's past and continuing	Agreements and how SCO believed IBM had	Rule 56.
	need more info	breached them, or that IBM had not decided that it	
	(Ex. 581 at 1.)	simply disagreed with SCO's interpretation of the	
		Agreements. (¶¶ 23-50.) Disputed to the extent the	
		statement suggests that SCO possessed such	
		information but declined to provide it to IBM, and	-
		to the extent the statement suggests that SCO	
		could have known or provided such information	
		without the information SCO sought from IBM.	
		(¶ 23-50; Ex. 165 ¶ 37.)	

	Bithesialcanent	N O's Reiponse	BWSRCh
57.	IBM reiterated its request for specifics by letter of	ocal" position	Deemed admitted: Nothing in SCO's statement
	May 5, 2003, stating that none of SCO's letters to	was that the Agreements could not be terminated,	specifically controverts IBM's facts with
	date had given IBM sufficient notice of alleged	such that IBM did not believe it had any	admissible evidence meeting the requirements of
	breaches, as required. IBM reminded SCO that,	obligation "to cure" at all. (¶ 23-50.) Disputed to	Rule 56.
	even if the AIX-related Agreements permitted	the extent the statement suggests that SCO had not	
	termination of its rights, they required, in addition	informed IBM and that IBM did not understand	
	to 100 days' specific written notice, SCO's "good	SCO's interpretation of the Agreements and how	
	faith best efforts" to resolve any alleged breach.	SCO believed IBM had breached them, or that	
	IBM also informed SCO that the specific	1BM had not decided that it simply disagreed with	
_	information it requested was required in order for	SCO's interpretation of the Agreements. (¶ 23-	
	IBM to cure any alleged breach. (See Ex. 156.)	50.) Disputed to the extent the statement suggests	
		that SCO possessed such information but declined	
		to provide it to IBM, and to the extent the	
		statement suggests that SCO could have known or	
		provided such information without the information	
		SCO sought from IBM. (¶ 23-50.) Disputed to	
		the extent the statement draws a legal conclusion.	
		Disputed to the extent the statement suggests that	
		in the letter IBM stated or otherwise suggested (a)	
		that IBM was retracting its statement that it was	
		willing to open-source any part of AIX, (b) that	
		IBM denied that it had made contributions to	
***********		Linux from AIX and Dynix/ptx, (c) that IBM	
		thought it was a violation of its UNIX Agreements	
		to contribute source code from AIX or Dynix/ptx	
		to Linux, (d) that IBM believed SCO had access to	
		AIX or Dynix/ptx source code, (e) that IBM could	
		not determine from its own employees what	
		contributions they had made to Linux, including	
		from AIX and Dynix/ptx, or (f) that IBM was	
		willing "to cure" its breaches by somehow	
		removing, for example, JFS or EVMS from Linux.	
		(4 23-50.)	

	IBM's Statement	INCONTRACTOR	
58.	Counsel for SCO and IBM met on June 2, 2003,	Disputed to the extent the statement suggests that	Deemed admitted: Nothing in SCO's statement
	some eighty-eight days into SCO's purported 100-	SCO had not informed IBM and that IBM did not	specifically controverts IBM's facts with
	day cure period. (Ex. 158 at 1.) Despite IBM's	understand SCO's interpretation of the	admissible evidence meeting the requirements of
	request, SCO did not provide the information	Agreements and how SCO believed IBM had	Rule 56.
	requested in IBM's April 2, 2003 letter. (1d.)	breached them, or that IBM had not decided that it	
		simply disagreed with SCO's interpretation of the	
		Agreements. (¶¶ 23-50.) Disputed to the extent the	
		statement suggests that SCO possessed such	
		information but declined to provide it to IBM, and	
		to the extent the statement suggests that SCO	
		could have known or provided such information	
		without the information SCO sought from IBM.	
_		(¶ 23-50.) Disputed to the extent the statement	
		draws a legal conclusion. Disputed to the extent	
		the statement suggests that during the meeting	
		IBM stated or otherwise suggested (a) that IBM	
		was retracting its statement that it was willing to	
		open-source any part of AIX, (b) that IBM denied	
		that it had made contributions to Linux from AIX	
		and Dynix/pt, (c) that IBM thought it was a	
		violation of its UNIX Agreements to contribute	
		source code from AIX or Dynix/ptx to Linux, (d)	
		that IBM believed SCO had access to AIX or	
		Dynix/ptx source code, (e) that IBM could not	
		determine from its own employees what	
		contributions they had made to Linux, including	
		from AIX and Dynix/ptx, or (f) that IBM was	
		willing "to cure" its breaches by somehow	
-		removing, for example, JFS or EVMS from Linux.	
		(11 23-50.)	

	IBM's Statement	SCO's Response	
59.	By letter of June 12, 2003, SC	material does not	Deemed admitted: (1) Nothing in SCO's
	that it would seek to terminate the license	support the statement. Disputed to the extent the	statement specifically controverts IBM's facts
	permitting IBM to use and distribute AIX on	statement suggests that SCO had not previously	with admissible evidence meeting the
	June 13, 2003. (Ex. 157 at 4.)	given IBM notice that SCO would terminate the	requirements of Rule 56. (2) The facts stated in
		license permitting IBM to use and distribute AIX.	IBM's referenced paragraph are fully supported
		(11 23-46.)	by the cited material. Ex. 157 at 4 states:
			"IBM's right to use and distribute the Software
			Product including derivatives and modifications,
			specifically AIX, will terminate as of tomorrow,
	-		June 13, 2003."
9	_	Disputed to the extent the statement suggests the	Deemed admitted: Nothing in SCO's statement
	[March 6, 2003] letter provided virtually no	accuracy of the internal statements quoted from	specifically controverts IBM's facts with
	information beyond its conclusory assertions. We	the cited material. (¶ 23-46.) Disputed to the	admissible evidence meeting the requirements of
	promptly requested such support but received	extent the statement suggests that in the letter IBM	Rule 56.
	nothing more prior to the June 2 meeting, 88 days	stated or otherwise suggested (a) that IBM was	
	into the purported 100 day "cure" period. At that	retracting its statement that it was willing to open-	
	meeting, your counsel did no more than repeat	source any part of AIX, (b) that IBM denied that it	
	your accusations, refer us to particular paragraphs	had made contributions to Linux from AIX and	
	of your complaint and show us a handful of notes	Dynix/pt, (c) that IBM thought it was a violation	
	from a website that does not, in fact, demonstrate	of its UNIX Agreements to contribute source code	
	any violation of protected license rights. Thus, to	from AIX or Dynix/ptx to Linux, (d) that IBM	
	this day, you have not provided IBM with any	believed SCO had access to AIX or Dynix/ptx	
	factual support for your accusations. That is	source code, (e) that IBM could not determine	
	precisely what we informed you and your	from its own employees what contributions they	
	colleagues at the June 2 meeting, when we	had made to Linux, including from A1X and	
	expressed our disappointment with the lack of	Dynix/ptx, or (f) that IBM was willing "to cure"	
	information received from you. (Ex. 158 at 1.)	its breaches by somehow removing, for example,	
		JFS or EVMS from Linux. (17 23-50.)	

	BW & Spienem	acco v response	IBM's Rain
61.	After IBM received SCO's letter of August 11,	ده ا	Deemed admitted: Nothing in SCO's statement
	2003, which purported to terminate the Dynix		specifically controverts IBM's facts with
	licenses as of July 30, 2003, IBM advised SCO on	the cited material. (¶¶ 23-46.) Disputed in that	admissible evidence meeting the requirements of
		IBM's "unequivocal" position was that the	Rule 56.
	notice of any possible July 30, 2003 termination	Agreements could not be terminated, such that	
	date in its letter. (Ex. 155; Ex. 159 at 1.) IBM	IBM did not believe it had any obligation "to	
	also made yet another request for specific notice	cure" at all. (¶¶ 23-50.) Disputed to the extent the	
	of the alleged breaches, in order that it might	statement suggests that SCO had not informed	
	attempt a cure: "I write to ask that you inform	IBM and that IBM did not understand SCO's	
	IBM specifically what SCO contends IBM has	interpretation of the Agreements and how SCO	
	done in violation of its obligations to SCO, and	believed IBM had breached them, or that IBM had	
	what you contend IBM should do to cure such	not decided that it simply disagreed with SCO's	
	violations." (Ex. 159 at 1.) SCO declined to	interpretation of the Agreements. (¶ 23-50.)	
	respond.	Disputed to the extent the statement suggests that	
		SCO possessed such information but declined to	
		provide it to IBM, and to the extent the statement	
-		suggests that SCO could have known or provided	
-		such information without the information SCO	
		sought from IBM. (¶¶ 23-50.) Disputed to the	
		extent the statement draws a legal conclusion.	
		Disputed to the extent the statement suggests that	
-		in the letter IBM stated or otherwise suggested (a)	- contract of the contract of
		that IBM was retracting its statement that it was	
		willing to open-source any part of AIX, (b) that	-
		IBM denied that it had made contributions to	
•		Linux from AIX and Dynix/pt, (c) that IBM	
		thought it was a violation of its UNIX Agreements	
		to contribute source code from AIX or Dynix/ptx	
		to Linux, (d) that IBM believed SCO had access to	
		AIX or Dynix/ptx source code, (e) that IBM could	
		not determine from its own employees what	
		contributions they had made to Linux, including	
		from AIX and Dynix/ptx, or (f) that IBM was	
		willing "to cure" its breaches by somehow	
		removing, for example, JFS or EVMS from Linux.	
1	And the state of t	(4723-50.)	

11	BASSET FILE		
62.		Disputed to the extent the statement draws a legal conclusion. Disputed to the extent the statement suggests that SCO did not so terminate the licenses or, in the context of IBM's refusal to give any indication it intended to cure its breach, did not use its good faith best efforts to have the problems solved. (¶ 23-50.)	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56. (1) SCO's contention that the referenced statement is a legal conclusion is contradicted by its own contention that good faith is a question of fact for the jury. (SCO Br. at 36.) (2) The paragraphs SCO cites reflect either (a) material that is irrelevant to SCO's good faith best efforts or (b) SCO's efforts to transform its initial allegations in this case from IBM's alleged disclosure of SCO's "UNIX trade secrets" into its current allegations of IBM's nanaterial.
63.	IBM had ceased selling Dynix source code prior to SCO's purported termination, and IBM has not sold it since. (See Ex. 229 at 60-62.) However, IBM has continued to sell AIX, as it has for more than two decades. (See Ex. 229 at 45; Ex. 256 ¶ 1, 33.)	Undisputed.	Undisputed.
64.	In February 2004, SCO amended its complaint to add a claim for copyright infringement. (See Ex. 3 ¶ 173-80.) By that claim, SCO alleges that IBM lias infringed, induced the infringement of, and contributed to the infringement of, certain UNIX copyrights allegedly owned by SCO. (See id.)	Disputed to the extent the statement suggests that SCO's claims in this case include only one relating to "copyright." (See note 1, above.) Disputed to the extent the statement suggests that SCO does not own the referenced copyrights. (¶ 51-70; Contracts Mem. ¶ 169-82.)	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56. The material referred to by SCO does not support SCO's statement.
65.	SCO, however, does not own the allegedly infringed copyrights, because Novell retained them under the APA. An amendment to the APA, Amendment No. 2, addressed certain UNIX copyrights, but did not actually transfer them. (Ex. 444.)	Disputed. (¶ 51-70; Contracts Mem. ¶ 169-82.)	Deemed admitted: Nothing in SCO's statement specifically controverts IBM's facts with admissible evidence meeting the requirements of Rule 56. Further, the Asset Purchase Agreement unambiguously provides that Novell retained all of AT&T's UNIX copyrights. (See Ex. 123 Art. I.I(a), Sched. I.I(b).) Nothing in SCO's statement specifically controverts the facts IBM states in the referenced paragraph with admissible evidence meeting the requirements of Rule 56.

1 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2	TBM (Station)	SCO's Reponse	
.99	Despite the fact that SCO does not own the	O owns the referenced	Deemed admitted: Nothing in SCO's statement
	allegedly infringed copyrights, SCO now claims:	copyrights. (¶ 51-70; Contracts Mem. ¶ 169-82.)	specifically controverts IBM's facts with
	that IBM breached its UNIX licensing agreements	Disputed to the extent the statement purports to	admissible evidence meeting the requirements of
	by contributing AIX and Dynix code to Linux;	summarize the cited material.	Rule 56. The material referred to by SCO does
	that SCO terminated IBM's licenses under the		not support SCO's statement. Further, the Asset
	agreements based on its alleged breaches; and that		Purchase Agreement unambiguously provides
	distribution of AIX and Dynix after the purported		that Novell retained all of AT&T's UNIX
	termination infringes SCO's alleged copyrights.		copyrights. (See Ex. 123 Art. 1.1(a), Sched.
	(See Ex. 3 11 173-86.)		I.1(b).) Nothing in SCO's statement specifically
			controverts the facts IBM states in the referenced
			paragraph with admissible evidence meeting the
			requirements of Rule 56.
67.	1BM propounded a series of discovery requests	Disputed to the extent the statement suggests that	Deemed admitted: Nothing in SCO's statement
	asking SCO to disclose its allegations and	SCO did not proceed in discovery in good faith	specifically controverts IBM's facts with
	evidence of copyright infringement. (Ex. 11;	(¶ 73-79), and to the extent the statement	admissible evidence meeting the requirements of
	Ex. 12.) SCO declined to provide IBM with the	suggests that IBM did not understand that SCO	Rule 56.
	information it requested, forcing IBM to make	based its copyright claim at issue on the grounds	
	two separate motions to compel, on October 1,	that AIX is a derivative work of UNIX System V	
	2003 and November 6, 2003. (Ex. 62; Ex. 63.)	within the meaning of the copyright laws (¶¶ 77-	
		(79).	
68.	The Court entered three separate orders, dated	Disputed to the extent the statement suggests that	Deemed Admitted: Nothing in SCO's statement
	December 12, 2003, March 3, 2004, and July 1,	SCO did not proceed in discovery in good faith	specifically controverts IBM's facts with
	2005, requiring SCO to describe in detail its	(¶ 73-79), and to the extent the statement	admissible evidence meeting the requirements of
	allegations of infringement. (Ex. 55 ¶ 4; Ex. 56	suggests that SCO did not specify or that IBM did	Rule 56, and SCO's response is further
	¶1.1-5; Ex. 58 III.) The Court required SCO to	not understand that SCO based its copyright claim	contradicted by Magistrate Judge Wells' June
	respond to IBM's interrogatories, and to identify	at issue on the grounds that AIX is a derivative	28, 2006 Order. (See IBM Ex. 59 at 26-27.)
	all allegedly misused material, by version, file,	work of UNIX System V within the meaning of	
	and line of code, including all allegedly infringed	the copyright laws (71 77-79). Disputed to the	
	and allegedly infringing material, not later than	extent the statement suggests that the Court had	
	December 22, 2005, in its Final Disclosures.	ordered, clearly or otherwise, SCO "to describe all	
	(Ex. 55 ¶ 4; Ex. 56 ¶¶ 1.1-5; Ex. 58 III.)	of the allegedly misused materials by version, file,	
		and line of code." (Contracts Mem. ¶ 234-93.)	

377			
9	69. Despite the Court's orders, SCO has never Disputed to the extent the statement suggests that Decmed admitted: Nothing in SCO's statement	Disputed to the extent the statement suggests that Deemed admitted: Nothing in SCO's statement	Deemed admitted: Nothing in SCO's statement
	described by version, file, and line of code any	SCO did not proceed in discovery in good faith	specifically controverts the undisputed fact that
	material allegedly infringed by IBM's post-	(¶ 73-79), and to the extent the statement	SCO has never described by version, file, and
	termination AIX and Dynix activities. (See	suggests that SCO did not specify or that IBM did line of code any material allegedly infringed by	line of code any material allegedly infringed by
	Ex. 151; Ex. 53; Ex. 54; Ex. 66; Ex. 59 at 28, 32,	not understand that SCO based its copyright claim IBM's post-termination AIX and Dynix	IBM's post-termination AIX and Dynix
	35-38.) Moreover, SCO has declined to provide	at issue on the grounds that AIX is a derivative	activities.
	the full and detailed responses to IBM's	work of UNIX System V within the meaning of	
	interrogatories directed at SCO's allegations of	the copyright laws (¶¶ 77-79). Disputed to the	
	unauthorized copying. (Ex. 151; Ex. 53; Ex. 54.)	extent the statement suggests that the Court had	
	Nowhere in its interrogatory responses served	ordered, clearly or otherwise, SCO "to describe all	
	with its interim disclosures did SCO provide any	of the allegedly misused materials by version, file,	
	specific allegations or evidence of any conduct by	and line of code." (Contracts Mem. ¶ 234-93.)	
	IBM constituting unauthorized copying. (See		
-	F. 161 F. 623		